JD(NY)-29-04
New York, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

CBS BROADCASTING, INC.

and Case 2-CA-35421

WRITERS GUILD OF AMERICA, EAST, INC.

Rita Lisko, Esq. for the General Counsel.
Elizabeth Orfan, Esq. for the Charging Party.
Mark W. Engstrom, Esq. for the Respondent.

DECISION

Statement of the Case

D. BARRY MORRIS, Administrative Law Judge: This case was heard before me in New York City on February 26 and 27 and March 17, 18, 22 and 23, 2004. Upon a charge filed on April 11, 2003, a complaint was issued on July 2, 2003, alleging that CBS Broadcasting, Inc. ("CBS" or "Respondent") violated Section 8(a)(1), (2) and (5) of the National Labor Relations Act, as amended (the "Act"). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally and file briefs. Briefs were filed by the parties on May 12, 2004.

Upon the entire record of the case[1], including my observation of the demeanor of the witnesses, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, a corporation with offices in New York City, has been engaged in the operation of television broadcasting stations. It has admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. In addition, it has been admitted, and I find, that Writers Guild of America, East, Inc. ("WGAE") and Writers Guild of America, west, Inc. ("WGW") are labor organizations within the meaning of Section 2(5) of the Act.

[1] Respondent's Motion to Correct Transcript is hereby granted.

II. The Alleged Unfair Labor Practices

A. The Facts

1. Background

Since 1958 WGAE and WGW have been the joint collective-bargaining representatives of a single nationwide unit of CBS newswriters, editors and other employees located in New York, Chicago, Washington and Los Angeles. The most recent collective-bargaining agreement is effective from April 2, 2002 through April 1, 2005.

2. Current Collective-Bargaining Agreement

Negotiations for the current collective-bargaining agreement began on March 6, 2002.[2] CBS submitted Proposal 7, which dealt with consolidation of operations. CBS was contemplating the acquisition of KCAL-TV, which would create a "duopoly" in the Los Angeles market. A duopoly is the ownership by a single entity of two television stations in the same television market. Leon Shulzinger, Vice-President of CBS, explained to the Unions' bargaining committee that since CBS already owned KCBS, it needed to settle arrangements as to WGA-covered employees at KCBS with non-covered employees at KCAL.

The Unions rejected Proposal 7. At subsequent negotiating sessions Proposal 7 was further discussed but CBS claimed that it did not yet know all of the details of the acquisition. On March 21 Mona Mangan, Executive Director of WGAE, asked Shulzinger if he was looking for a contract reopener. He answered that he was not.

On April 6 Shulzinger presented a revised Proposal 7 to the Unions' negotiating committee. That document began with the following italicized language: "Conceptual outline subject to change as the duopoly plan evolves". Mangan testified that the parties had agreed that the language would be removed. Harry Isaacs, Senior Vice-President of CBS, testified that the parties did not agree that the language should be removed. Shulzinger testified that it was he who removed the language and that "under my normal routine for drafting, language at the top of the agreement in italics is not intended to be contract language *per se*".

On April 7 the parties reached agreement on the collective-bargaining agreement. John McLean, Executive Director of WGW, stated that the agreement served as a "template " for future duopolies. The final written agreement was signed by the parties on November 18 and early December. The final signed agreement did *not* contain the statement in Sideletter 15, "Conceptual outline subject to change as the duopoly plan evolves".

3. Sideletter 15

On May 15 the acquisition of KCAL was consummated. The decision was made that the KCAL employees would be moved to the KCBS location. Chuck Marchese, the representative of WGW, had concerns about the physical construction involved. A meeting was set up with WGW and CBS representatives for September 13. Shulzinger testified that at the September 13 meeting CBS intended to bring up its dissatisfaction with the provisions of Sideletter 15.

[2] All dates refer to 2002 unless otherwise specified.

Shulzinger testified that Marchese was "taken by surprise" when he learned of CBS's intention to negotiate changes to the agreement and that he told the CBS representatives that he was not prepared to engage in the negotiations that CBS contemplated.

Mangan testified that on November 8 she received a telephone call from McLean who told her that he had been talking to Isaacs about producers writing and about removing them from the unit. Mangan testified that she told McLean, "you can't do that, John". She testified that they began "yelling at each other" and she hung up. Ann Toback, Assistant Counsel of WGAE, testified that the conversation between Mangan and McLean took place on November 7. McLean testified that the conversation took place on September 17 or 18 and ended up in a "screaming match". On November 8 Mangan sent the following e-mail to McLean:

> Please do not take any action to alter the WGA-CBS collective-bargaining agreement with regard to its scope or jurisdictional clauses or other provisions regarding producers writing. Any such change would fundamentally alter the collective-bargaining agreement. We should convene a national council meeting to consider such changes. You should not feel free to alter unilaterally the collective-bargaining agreement to which both east [and] west are signatory.

Shulzinger testified that McLean told Isaacs and himself that Mangan objected to the making of any changes in Sideletter 15. However, CBS continued to negotiate with WGW despite WGAE's objections. On November 22, CBS and WGW held a negotiating session. McLean proposed a new job title, which had never been used before, namely, supervisory writer/producer. This new position would not be in the unit. Shulzinger admitted that for many years, while negotiating with WGAE, CBS wanted writer/supervisors out of the unit, while WGAE insisted that they remain in the unit.

On December 20 Mangan sent the following e-mail to McLean:

> I…request[ed] that you not pursue bargaining with CBS without both parties participating. The contract states that the parties and employees will meet during the transition period and thereafter to discuss the plans, issues and questions related to the merger of the newsrooms. The Writers Guild of America, East is one of the parties. You may not bargain without us…Please understand that you may execute nothing which impacts the collective-bargaining agreement.

Despite Mangan's objections, CBS and WGW entered into a Duopoly Agreement which revised Sideletter 15. McLean signed the agreement on behalf of WGW on December 31, 2002 and Shulzinger signed on behalf of CBS on January 6, 2003. Isaacs conceded that the creation of a new position called supervisory writer/producer was a "substantive" change.

B. Discussion and Conclusions

1. Section 10(b)

Respondent contends that the complaint should be dismissed pursuant to Section 10(b) of the Act because WGAE had knowledge of the alleged unfair labor practices more than six months before filing the charge. WGAE filed its charge on April 11, 2003. Toback and Mangan testified that the original phone call from McLean was either November 7 or 8, 2002. McLean

testified that the conversation took place on September 17 or 18. I credit Toback's and Mangan's testimony. On November 8 Mangan sent an e-mail to McLean advising him "not to take any action to alter the WGA-CBS collective-bargaining agreement". If the conversation took place on September 17 or 18, it is highly unlikely that Mangan would wait for 2 months to advise McLean that his proposed negotiations were unacceptable. It is more plausible that Mangan's e-mail was sent one or two days after the volatile conversation. I find that the conversation took place on November 7 or 8, well within the Section 10(b) period.

A statement of intent to commit an unfair labor practice does not start the running of the 10(b) period. The 10(b) period starts only when a party has a clear and unequivocal notice of a violation of the Act. *Concourse Nursing Home,* 328 NLRB 692, 694 (1999). The burden of showing such clear and unequivocal notice is on the party raising the affirmative defense of Section 10(b). *Chinese American Planning Council,* 307 NLRB 410 (1992); *Allied Production Workers Local 12,* 331 NLRB 1, 2 (2000). I find that Respondent has not satisfied its burden.

2. Preamble to Proposal 7

Proposal 7 began with the following italicized language: "Conceptual outline subject to change as the duopoly plan evolves". Respondent argues that because of this language it had the right to enter into substantive negotiations with WGA after the collective-bargaining agreement had gone into effect.

Mangan testified that the parties agreed to remove the "conceptual" language. Isaacs testified that that no such agreement was reached. I find no persuasive reason to credit one witness over the other and therefore do not believe that I need to make a credibility resolution as to whether in fact is was agreed to remove the "conceptual" language. See *National Telephone Directory Corp.,* 319 NLRB 420, 422 (1995).

More importantly, however, Shulzinger testified that he was not looking for a reopener provision. In addition, he testified that it was he who removed the "conceptual" language and that language at the top of a provision in italics is not intended to be part of the agreement. I credit Shulzinger's testimony and find that it was he, the representative of CBS, who removed the provision and that it was never intended to be part of the agreement.

3. Modification of Sideletter 15

WGAE and WGW were joint collective-bargaining representatives. No substantive modification to the collective-bargaining agreement could be made without the involvement of both WGAE and WGW. The final executed agreement does not contain the "conceptual" language and there is no reopener clause. Accordingly, WGAE was under no legal obligation to bargain over any mid-term modification.

General Counsel has cited the case of *California Nevada Golden Tours,* 283 NLRB 58 (1987), where it was held that Respondent violated Section 8(a)(1), (2) and (5) of the Act by negotiating and implementing a successor collective-bargaining agreement with one of the unions of a joint collective-bargaining representative. CBS argues that that case is distinguishable because in the instant proceeding it is well-established that WGAE deals with East coast matters and WGW deals with West coast matters. CBS has elicited much testimony concerning instances when either WGAE or WGW has dealt alone with its own constituents. However in these cases generally the matters involved are minor in nature. Thus, for example the collective-bargaining agreement provides for time limits during which temporary employees may be employed. On numerous occasions one of the two Unions, by itself, has signed written

waivers permitting CBS to employ a particular individual for a slightly longer time period. Or, over the years one of the two Unions would separately agree to "buy-outs" whereby the employee would receive a severance package different from that specified in the collective-bargaining agreement. But these are minor adjustments. As Isaacs conceded the addition of a new position called supervisory writer/producer was a "substantive" change. This clearly could not be done without the active involvement of both Unions.

4. Waiver

CBS contends that WGAE waived its right to bargain by not requesting that CBS cease bargaining with WGW. It is well-established that any waiver of a representative's right to bargain must be "clear and unmistakable". *General Electric Co. v. NLRB,* 414 F. 2d 918, 923 (4th Cir. 1969), cert. denied, 396 U.S. 1005 (1970). CBS was aware that Mangan objected to any modification to Sideletter 15. Respondent's negotiating with WGW and entering into a substantive modification of Sideletter 15 with WGW constitutes a violation of Section 8(a)(1) and (5) of the Act. See, *Ozanne Construction Co.,* 317 NLRB 396, 399 (1995), enfd. 112 F. 3d 219 (6th Cir. 1997).

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. WGAE and WGW are the joint exclusive collective-bargaining representatives of Respondent's employees in the appropriate unit.

4. Respondent violated Section 8(a)(1), (2) and (5) of the Act by negotiating with WGW and executing the Duopoly Agreement with WGW.

5. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[3]

ORDER

Respondent, CBS Broadcasting, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to recognize WGAE as the joint exclusive collective-bargaining representative of the employees in the appropriate unit.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Recognizing WGW as the exclusive collective-bargaining representative of the employees in the appropriate unit.

(c) Enforcing or giving effect to the Duopoly Agreement dated December 12, 2002.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Withdraw and withhold recognition from WGW as the exclusive collective-bargaining representative of Respondent's employees in the appropriate unit, provided, however, that nothing in this Order shall prohibit Respondent from dealing with WGW on non-substantive matters, consistent with past practice.

(b) Recognize, and on request, bargain with both WGAE and WGW as the joint exclusive collective-bargaining representatives of the employees in the appropriate unit.

(c) Within 14 days after service by the Region, post at its facilities copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 8, 2002.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

D. Barry Morris
Administrative Law Judge

[4] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT fail and refuse to recognize Writers Guild of America, East as the joint exclusive collective-bargaining representative of the employees in the appropriate unit.

WE WILL NOT recognize Writers Guild of America, west as the exclusive collective-bargaining representative of the employees in the appropriate unit.

WE WILL NOT enforce or give effect to the Duopoly Agreement dated December 12, 2003.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withdraw and withhold recognition from Writers Guild of America, west as the exclusive collective-bargaining representative of the employees in the appropriate unit. However, CBS shall not be prohibited from dealing with Writers Guild of America, west on non-substantive matters, consistent with past practice.

CBS BROADCASTING, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal Agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614, New York, NY 10278-0104

(212) 264-0300, Hours: 8:45 a.m. to 5:15 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (212) 264-0346.